

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Jeffrey S.,

Claimant,

v.

EASTERN LOS ANGELES REGIONAL
CENTER,

Respondent.

OAH Case No. 2011100971

DECISION

Administrative Law Judge Nancy Beezy Micon, State of California, Office of Administrative Hearings, heard this matter on December 14, 2011, in Alhambra, California.

Judy Castañeda, Fair Hearing Coordinator, Eastern Los Angeles Regional Center (ELARC, Regional Center, or Service Agency) represented ELARC.

Jeffrey S. (Claimant) was represented by his mother.¹

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision at the conclusion of the hearing on December 14, 2011.

ISSUE

Should the decision of the ELARC to deny funding for in-home respite hours in lieu of days of out-of-home respite services be sustained?

///

¹ Initials have been used to protect the privacy of Claimant and his family.

FACTUAL FINDINGS

1. Claimant is a 4-year-old Regional Center consumer with a diagnosis of autism. He lives at home with his parents and two older brothers in Whittier, California. Claimant's mother is a stay-at-home mom; Claimant's father works out of the home. According to his most recent individual program plan (IPP) report, following an IPP conference on August 25, 2011, Claimant is able to verbally communicate his wants and needs but cannot converse. Claimant uses diapers and is dependent on others for his personal care needs. Claimant displays negative behaviors, such as temper tantrums that can last up to three hours, banging his head on the wall, and throwing objects. Claimant receives \$734 in social security income (SSI) per month.

2. Claimant suffers from chronic lung disease and moderate persistent asthma. He also has gastro esophageal reflux disease and a history of multiple pneumonia. He gets asthma attacks, on average, one time per month. Claimant takes several medications to manage his medical conditions. He has difficulty swallowing, which makes the possibility of choking high, and his food must be chopped into small pieces. Claimant thus requires supervision when eating. According to Claimant's mother, Claimant has been hospitalized on numerous occasions and requires medical attention at least one time per month. Claimant is currently scheduled for a surgery on January 4, 2012.

3. Claimant attends preschool. He is in a special education program and receives speech and language as well as occupational training services as part of his school program. At the time of Claimant's IPP in August 2011, Claimant's school district provided transportation services to and from the school.

4. ELARC provides funding for Claimant to attend a social skills training group five times per week through Progressive Resources. ELARC also provides funding for 36 hours per month of floor time services through a vendor organization called Holding Hands. The floor time services are targeted toward reducing Claimant's behavioral challenges, such as banging his head and having tantrums.

Respite

5. Claimant has been receiving 30 hours per month (90 hours per quarter) of respite services since the IPP conducted in August 2011. Claimant had the previous year received 24 hours per month of respite services. Claimant's August 25, 2011 IPP states that Claimant's parents requested the respite services to help reduce some of the stress associated with caring for Claimant. Claimant's aunt is the respite provider for Claimant. Claimant's parents use the respite time to engage in activities with their other children, to spend time together, and to run errands outside the home.

6. Claimant's parents are entitled to 21 days per year of out-of-home respite services in addition to the 90 hours per quarter of in-home respite services they receive.

7. On October 13, 2011, Claimant's mother sent an e-mail to Karla Vasquez, Claimant's service coordinator at ELARC, to request authorization for two days of in-home respite services, on October 22 and 29, 2011, in lieu of two days of the out-of-home respite services Claimant's parents are entitled to receive. Claimant's mother had made this type of request approximately five times in the preceding year and each time the request had been granted. On this occasion, Vasquez informed Claimant's mother that she could no longer automatically grant the request. At hearing, Vasquez explained that she informed Claimant's mother that, before granting her request, she needed to first explore the possibility of using out-of-home respite or other natural resources to provide the respite. According to Vasquez, Regional Center, at the end of August 2011, had informed the service coordinators that they must adhere to ELARC policy on the use of in-home respite in lieu of out-of-home respite. Vasquez implemented this requirement with all of her clients.

8. The ELARC policy on out-of-home respite services provides: "In home respite in lieu of out of home respite may be used only when there is no out of home respite arrangement available." The policy requires the submission of the following information before a request for in-home respite in lieu of out-of-home respite may be granted: proof of vacation plans; information concerning the respite caretaker; written authorization for the regional center to make unannounced visits to ensure Claimant's health and safety; and the hours needed for respite care. The policy directs the service coordinator to also explore whether there are generic resources or natural supports, such as extended family or friends, available to provide the respite, and specifically notes the "parents' responsibility to provide care and supervision to a minor under 13 years of age."

9. Claimant's mother explained that her son cannot be cared for outside the home. According to Claimant's mother, Claimant needs a familiar environment where he is comfortable. When Claimant's mother made the request, Claimant had just returned home from a one-day hospitalization caused by his asthma and gastric reflux. A surgery has been scheduled for Claimant for January 4, 2012 to address his medical conditions. The family was under a lot of stress and anxious about Claimant's health when he returned from the hospital. Claimant's mother planned to use the two additional days of in-home respite to "de-stress" and plan for Claimant's upcoming surgery. Claimant's mother contends that a residential placement is not an option due to her son's health complications, his behavioral issues, and his inability to speak English. Claimant's mother acknowledges that some out-of-home placements provide nursing care. Still, she is unwilling at this point in her child's development to even visit an out-of-home respite facility for possible consideration.

///

10. Claimant's mother concedes that she declined the offer from ELARC to visit possible out-of-home respite care providers. According to Claimant's mother, Claimant's aunt (her sister) is the only family member who is able to provide care for Claimant. Claimant's mother has in the past asked her sister to provide care, without pay, but it is very difficult for Claimant's aunt to do this due to Claimant's extensive needs.

11. On October 18, 2011, Service Agency sent a Noticed of Proposed Action to Claimant to notify the family that ELARC denied their request for in-home respite in lieu of out-of-home respite services. On October 27, 2011, Claimant's mother, on Claimant's behalf, filed a timely fair hearing request to ELARC's notice of proposed action. Claimant does not dispute the amount of respite hours provided. Claimant seeks through this appeal to be able to obtain, as a result of his circumstances, in-home respite in lieu of out-of-home respite without having to follow the approval process set forth in the ELARC policy.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act (Lanterman Act) to provide a pattern of facilities and services sufficiently complete to meet the needs of each person with a qualifying developmental disability, regardless of age or degree of handicap, and at each stage of life. (§ 4500 et seq.) An administrative "fair hearing" to determine the rights and obligations of the parties, if any, is available under the Lanterman Act. (§§ 4700-4716.) Claimant submitted a fair hearing request to appeal the Service Agency's denial of funding for the in-home respite in lieu of out-of-home respite. Jurisdiction in this case was thus established.

2. "Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or of the court. The standard of proof in this case is the preponderance of the evidence. (Evid. Code, § 115.) A regional center seeking to change its prior practice has the burden to demonstrate its decision is correct, because the party asserting a claim or making changes generally has the burden of proof in administrative proceedings. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, the Service Agency bears the burden of proof regarding its proposed denial of funding for the services in question, because it seeks to change the approval process for funding it had previously used to provide for those services.

///

///

Respite Services

3. Respite is defined under section 4690.2, subdivision (a), as follows:

“In-home respite services” means intermittent or regularly scheduled temporary nonmedical care and supervision provided in the client’s own home, for a regional center client who resides with a family member. These services are designed to do all of the following:

- (1) Assist family members in maintaining the client at home.
- (2) Provide appropriate care and supervision to ensure the client’s safety in the absence of family members.
- (3) Relieve family members from the constantly demanding responsibility of caring for the client.
- (4) Attend to the client’s basic self-help needs and other activities of daily living including interaction, socialization, and continuation of usual daily routines which would ordinarily be performed by the family members.

4. The Legislature enacted section 4686.5, subdivision (a)(2), which provides that a regional center shall not purchase more than 90 hours of in-home respite services in a quarter, in response to California’s fiscal emergency. A regional center may grant an exemption to the funding limitation in section 4686.5 only if it is demonstrated that the intensity of the consumer’s care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home, or there is an extraordinary event that impacts the family member’s ability to meet the care and supervision needs of the consumer. (§ 4686.5, subd. (a)(3).)

5. Section 4686.5 states in pertinent part:

(a) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, all of the following shall apply:

(1) A regional center may only purchase respite services when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities.

(2) A regional center shall not purchase more than 21 days of out-

of-home respite services in a fiscal year nor more than 90 hours of in-home respite services in a quarter, for a consumer.

(3)(A) A regional center may grant an exemption to the requirements set forth in paragraphs (1) and (2) if it is demonstrated that the intensity of the consumer's care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home, or there is an extraordinary event that impacts the family member's ability to meet the care and supervision needs of the consumer.

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

6. In this case, the parties agreed during Claimant's individual program planning process that 90 hours per quarter of in-home respite services was appropriate for Claimant. This level of in-home respite was a six hour per month increase from the amount of in-home respite Claimant's parents received the previous year. It is undisputed that Claimant's family is entitled to 21 days of out-of-home respite each year. In the past, Claimant's mother was able to obtain authorization to use funds allotted for out-of-home respite to obtain additional in-home respite services without going through the approval process required by ELARC policy. At the end of August 2011, the service coordinators for ELARC were instructed that they must comply with ELARC policy before granting requests for in-home respite in lieu of out-of-home respite. Claimant's service coordinator attempted to follow the Regional Center's policy when responding to Claimant's October 13, 2011 request. It is reasonable for ELARC to require Claimant to follow the protocol set forth in its policy before granting this type of request. Regional Center has been directed by the Legislature to comply with its policies. The service coordinator implemented the ELARC policy in a consistent fashion. The application of the policy does not prevent Claimant from receiving needed services and supports. Claimant's desire to not have to follow the policy, due to her son's circumstances, is not justified. Claimant's circumstances may change. It would be unreasonable to have an automatic approval for this type of request without first showing that the current circumstances justify approval for the additional in-home respite services in lieu of the out-of-home respite. This does not preclude Claimant from communicating with ELARC should circumstances arise where additional funding is needed for in-home respite or other support services.

ORDER

Claimant's appeal is denied.

Dated: December __, 2011

Nancy Beezy Micon
Administrative Law Judge
Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION; BOTH PARTIES ARE BOUND BY THIS DECISION. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN 90 DAYS.